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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTONIO FIASCHE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Boyd v. United States*, 116 U.S. 616, 635 (1886), Mr. Justice Bradley, while assaying Fourth Amendment protections, explained: "It is the duty of courts to be watchful for the constitutional rights of its citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" Ital. in original.

1. Whether the holding in *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), authorizing warrantless entries while coming to the aid of endangered home occupants, abrogates the Fourth Amendment's "probable cause plus exigent circumstances" doctrine, as settled by the Court's pre-*Brigham City* cases, and now sanctions warrantless entries into a citizen's home or enclosed backyard by DEA agents hoping to find drugs, where the purported emergency principally involves hearing an otherwise undefinable "swishing" sound from petitioner's enclosed backyard?

A. Whether federal agents can circumvent Fourth Amendment warrant protections by creating "knock and talk" exigent circumstances to justify the warrantless entry into a citizen's home?

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Antonio Fiasche (petitioner or Fiasche), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was filed on March 21, 2008 and is cited at 520 F.3d 694. App. 1-12. Fiasche's rehearing petition was denied on May 9, 2008. App. 13-14. The March 10, 2006, district court memorandum opinion rejecting petitioner's suppression motion is unreported. App. 15-37. On April 5, 2006, the district court denied suppression reconsideration. App. 38.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 21, 2008. App. 1-12. Petitioner's timely rehearing petition was denied on May 9, 2008. App. 13-14. The Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and the United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction pursuant to 18 U.S.C. § 3231.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES AND RULES

U.S. Constitution, Fourth Amendment.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fed. R. Crim. P. 41(d)(3)(A) states:

> (3) Requesting a Warrant by Telephonic or Other Means.
>
> > (A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.
> >
> > (B) Recording Testimony. Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:
> >
> > > (i) place under oath the applicant and any person on whose testimony the application is based; and
> > >
> > > (ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances. West 2007.

STATEMENT

1. INTRODUCTION

The centerpiece of this petition involves Fourth Amendment issues involving "exigent" circumstances where, during the afternoon of September 2, 2005, the government never contended that the Drug Enforcement Agents (DEA) agents' warrantless entry into petitioner's enclosed backyard and home resulted from objective concerns regarding the health, safety or welfare of any home occupant. Rather, the government successfully contended below that the warrantless entries into petitioner's backyard and home were justified because of "exigent" circumstances relating to an ongoing drug investigation. Several DEA agents went to the front of petitioner's home to execute [a]

"knock and talk." DEA Agent Oko went to the side of petitioner's single story brick ranch home–near a closed gate leading into the backyard. Agent Oko, after hearing an otherwise undefined "swishing" sound from the backyard, opened the gate and ran into petitioner's backyard. After seeing nothing of investigative significance, Agent Oko remained in the backyard and walked up two or three patio stairs. From that vantage point he heard [a] toilet flushing. He remained where he was, and after a minute or so, heard another toilet flush. Thereafter, he and other agents immediately entered petitioner's home through [backyard] patio doors. The government conceded below that petitioner's enclosed backyard was, for Fourth Amendment purposes, "curtilage."

2. SUMMARY OF DISTRICT COURT PROCEEDINGS

On October 25, 2005, petitioner and co-defendant, Antonio Vitagliano (Vitagliano), were charged by a federal grand jury in Chicago with drug related offenses. R. 24. Both filed motions to suppress physical evidence and on March 10, 2006, following evidentiary hearings, the district court rejected suppression. R. 30, 33-36, 50-51. App. 15-37. Thereafter, petitioner entered a guilty plea, reserving his right to challenge the adverse district court suppression rulings. R. 81-82. On December 12, 2006 petitioner was sentenced to eighty-seven months in custody. R. 100. Petitioner is in custody pending disposition of this petition.

3. DISTRICT COURT SUPPRESSION HEARING–JANUARY 27, 2006

On August 25, 2005, Lars Bjerga (Bjerga) was arrested in Kentucky for possessing ten pounds of marijuana. Suppression Tr. of 1/27/06, at Tr. 5, 8, 11-12. Post-arrest, Bjerga informed Kentucky police that he secured the marijuana from "Tony," who lived in the Chicago area, in a brick ranch home with a fenced-in backyard. Bjerga also maintained that he recently delivered approximately $134,000 to Tony's home. After providing the police with phone numbers for "Tony," Bjerga stated that "Tony" and another man, driving a Lexus or a rented car, were taking $500,000 to New York on either September 2 or 3, 2005. *Id.* at 5-6, 86, 218-19.

During the morning of September 2, 2005, Louisville, Kentucky DEA contacted Chicago DEA and provided Bjerga's information. Chicago DEA Agent Jennifer Traud tracked one of the phone numbers and ascertained petitioner's Chicago address. She shared the information with her supervisor, and several agents were dispatched to petitioner's home around noon on September 2, 2005. *Id.* at 5-6. Shortly after the agents took surveillance positions, two of the agents followed petitioner as he drove to a local chiropractor and then to a hospital. *Id.* at 16-17. Petitioner returned home around 1:30 p.m. *Id.* at 166.

In the meantime, a car driven by Vitagliano had parked in petitioner's driveway. Vitagliano, accessing an electronic keypad, opened petitioner's garage door and (apparently) entered the home. *Id.* at 164, 166, 259. Shortly after petitioner returned home, Vitagliano drove

away carrying a white box and brown paper bag. *Id.* at 84, 167, 260. Vitagliano was followed for several miles and was stopped by federal agents. The proffered suppression reasons for stopping the car included eratic driving, speeding, and Vitagliano (possibly) "making" the agents and using a cell phone. A search of the brown paper bag and white box revealed approximately 200 Ecstacy pills and a cell phone. *Id.* at 22-25, 87-89. However, the official DEA-6 reports failed to detail the proffered testimonial reasons for stopping Vitagliano's car. *Id.* at Tr. 69-70, 79, 122. Moreover, regarding the nature of the investigation–it was based on "money" movement, *not narcotics*. *Id.* at Tr. 99 (petitioner's emph.).

4. SUPPRESSION TESTIMONY REGARDING THE WARRANTLESS ENTRY AND SEARCH OF PETITIONER'S HOME DURING THE AFTERNOON OF SEPTEMBER 2, 2005

DEA Agent Oko testified that he was outside petitioner's home conducting surveillance, and when he arrived Vitagliano's silver Chevy Malibu had just pulled into the driveway. Suppression Tr. of 1/27/06 at Tr. 128-29. Around 2:30 p.m. he and other agents approached the front of the home–but since there were enough agents in the front–he went to the side to make sure nobody left the side door while agents in the front were attempting a "knock and talk." Agent Oko understood that the DEA information was someone would be leaving the home with a large amount of money, and an earlier traffic stop resulted in the seizure of Ecstacy pills–and the individual stopped had exited petitioner's home carrying a box. Tr. 129-33.

As Agent Oko was lingering at the side of the home he heard a "swishing sound"–not a bang–but loud enough to grab his attention. He ran to the back area of the home while the agents were in front just beginning "to knock." Agent Oko ran to the gated area, opened the gate and ran into the backyard. At that time he saw a back door and porch–nothing remarkable. *Id.* at 133-34. The reason he went into the backyard was to investigate the noise he heard–but he saw no one in the backyard. However he saw open patio doors and a torn/shredded screen. He "perceived" that someone ran out of the house through the screen door and jumped the fence–that's what he was thinking. *Id.* at 136-37. He approached the patio doors to investigate the tattered screen and heard a flushing sound when he was two or three feet from an open window; he heard nothing else at that time. *Id.* at 137-39. When DEA Agent Fernandez came into the backyard, Agent Oko told her about the toilet flushing and she returned to the front. Within a minute or two he heard another flush and "that was it" . . . he waited for the other agents and they entered petitioner's home through the rear patio doors. *Id.* at 139-40. Agent Oko maintained that he entered the home because he thought someone was destroying evidence. *Id.* at 141. Post-warrantless entry, a search of the home revealed petitioner (no one else) along with drugs and U.S.C. Petitioner was immediately arrested. *Id.* at 142-44, 207-09.

Under cross-examination, Agent Oko explained that part of DEA enforcement procedure includes executing "knock and talk," where they attempt to speak to an individual and get consent to search. Because there were five agents at the front, he decided to move to the side.

They had been on surveillance for a couple of hours, and during that time no one was seen walking around the property and there was a fairly high stone fence around the property. *Id.* at 148-49.

Agent Oko explained that he did not hear the front door "knock," but he heard a "loud swish," it was not a bang and he could not really explain the noise; it caused him to go running into the backyard area–it was loud enough to get his attention. *Id.* at 149-51. When he ran into the fenced in area no one was there, but he thought somebody made it over a rear wooden fence. However, he didn't chase anyone, yell out for help, or communicate with other agents in connection with what he thought was a fence-jumper. When Agent Fernandez came into the back he did not tell her he thought someone "jumped" the fence. *Id.* at 153-54. Agent Oko conceded that he had not heard any flushing sounds until he went up the three or four patio steps which led to the patio screen doors. *Id.* at 155. When he heard the flushing sounds, separated by a minute or two, he did not yell anything through the screen door such as "police." *Id.* at 155-56. When Agent Oko heard the first flushing sound–he made the "determination" *that they were going to go into the home. Id.* at 156 (ital. emph. added). Moreover, at the time of entry there was no odor of marijuana or any such thing, and before entering petitioner's home there was no contraband that he had seen–and there was *no information regarding anyone being armed or dangerous. Id.* at 157-58 (ital. emph. added). DEA Agent Amelia Fernandez testified that she and other agents arrived at petitioner's home at about 12:50 p.m.; at about 1:15 she saw Vitagliano's car pull into the driveway. *Id.* at 163-64. She noted there were

two cars in the driveway at the time, Vitagliano then went into the garage. Fifteen or twenty minutes later petitioner's Lexus pulled into the garage and several minutes later Vitagliano left carrying a box and brown paper bag. *Id.* at 165-68.

After a "knock and talk" plan was reached in the hope of getting petitioner's consent for the search of his home, she left the front and went into the backyard through an open gate because Agent Oko was alone. She saw Agent Oko at the patio landing and he related he heard "flushing" and requested that she tell the agents in front what he heard. *Id.* at 166-69. She ran to the front, alerted other agents about the "flushing," and stayed at the front while the others ran to the rear. *Id.* at 170.

Additional suppression witnesses included DEA Agent Todd Arthur and Group Supervisor Kenneth Walter. Agent Arthur again described "knock and talk," and the events involving the arrest of Vitagliano. *Id.* at 195-200. After entering the home, petitioner was arrested and a subsequent [consent] search revealed drugs and U.S.C. *Id.* at 207-09. DEA Agent Traud was recalled and testified that the decision to approach petitioner's home occurred at about 2:30 p.m. *Id.* at 220. She attempted to clarify the time line regarding Bjerga–he was arrested in Kentucky on August 25 and on September 2nd apparently Bjerga's lawyer provided the money-moving information. *Id.* at 222-26. Further testimony disclosed that Bjerga spoke with petitioner on September 1st, and during that phone conversation petitioner wanted Bjerga to return to Chicago and drive the "money" to New York. *Id.* at 234-35.

5. SUPPRESSION HEARINGS CONTINUED ON FEBRUARY 1, 2006

The February 1, 2006, hearing related to Vitagliano's motion to suppress evidence seized from his car after being stopped by DEA agents during the afternoon of September 2, 2005. His suppression motion and testimony provided the basis for his motion (stopped without probable cause). Suppression Tr. of 2/1/06 at Tr. 249-59. Vitagliano testified, *inter alia*, that he did not provide oral consent to search his vehicle or the white box/paper bag. Government rebuttal witnesses testified that he was stopped because the composite circumstances, including speeding, eratic driving, and the purported use of a cell phone while he was being pursued justified the stop. Further, the rebuttal witnesses testified that Vitagliano provided oral search-consent. *Id.* at 277-78, 298, 315.[1]

6. THE DISTRICT COURT'S MARCH 10, 2006, OPINION DENYING SUPPRESSION AND THE SEVENTH CIRCUIT SUPPRESSION-DENIAL AFFIRMATION

In advance of the district court's suppression decision, briefs were filed in support and opposition of suppression. Importantly, the government's February 23, 2006, supplemental brief in opposition of suppression conceded that Fiasche's enclosed backyard was subject to Fourth Amendment constraints. The government's filing included:

> Fourth Amendment protection has also been extended to the "curtilage" of the home which,

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1. Vitagliano's arrest and the search of his vehicle are not before the Court within the contours of this petition.

> in this instance, would included the walled and fenced area of the back yard, adjacent to the home, which FIASCHE may have reasonably expected would remain private.

R. 46, at p. 11.

The district court memorandum opinion rejecting petitioner's Fourth Amendment importunings acknowledged that [his] backyard "was a protected area." R. 51 at p. 15, App. 32. The opinion then held that Agent Oko's entry was justified because (1) agents were in the process of contacting [knock and talk] the home occupants, (2) the house had been accurately described by the informant [Bjerga], (3) the house had contained drugs at some point, and (4) Vitagliano had drugs when he was stopped. Regarding Agent Oko (5) he heard "the noise," and thought that someone exited the house, (6) when he ran back and saw a broken screen he heard a flush and learned that contact had been made in front, (7) he heard another flushing "accompanied" with the understanding that the occupants knew the police were present–which created exigent circumstances. R. 51 at p. 15, App. 32. Furthermore, while rejecting suppression the district court held:

> In this case, by comparison the authorities did not believe there to be exigent circumstances at the outset and instead opted to try the knock and talk approach. It was only when Oko heard what he thought might be someone trying to escape that he entered a protected

> area. That entry, as noted, was proper because of exigent circumstances.

R. 51, p. 16, n. 4. App. 33 at n. 4.

On March 21, 2008, the court of appeals affirmed. Circuit Judge Evans' opinion for the court acknowledged that warrantless home searches are presumptively unreasonable and the government bears the burden of proving that it had an objectively reasonable belief that exigent circumstances existed at the time of the warrantless entry. App. 10-11. With that preface the court, in a single paragraph, affirmed suppression denial. App. 10-11.[2]

REASONS FOR GRANTING THE PETITION

1. *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) provides sound precedent regarding warrantless home entries where police intervention concerned an occupant's health, safety or welfare. But the lower courts, before and after *Brigham City*, remain divided regarding warrantless entries not involving home occupants' safety or welfare, because the Court's pre-*Brigham City* cases demand *probable cause plus exigent circumstances* justifying warrantless–home encroachment–arrests and evidence-seizures. Compare *United States v. Snipe*, 515 F.3d 947 (9th Cir. 2008) (rejecting suppression where exigent circumstances supported warrantless home entry, citing *Brigham*

2. Since the government conceded, and the district court accepted, that petitioner's enclosed backyard comprised home-curtilage, petitioner pretermits curtilage-Fourth Amendment authorities.

City), with *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008) reversing district court suppression denial–where police created exigent circumstances), and *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008) (affirming suppression while rejecting exigent circumstances in connection with warrantless entry into defendant's motel room) (*Brigham City* was not cited in either *Mowatt* or *Reeves*).

Moreover, the lower courts remain divided regarding whether police or federal agents can "create" exigent circumstances justifying the warrantless entry into citizens' homes.

A. PRE-*BRIGHAM CITY* PRECEDENTS: In *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), Justice Jackson's eloquent suppression opinion supported the proposition that "zealous" officers seldom grasp the importance of the Fourth Amendment. 333 U.S. at 13;[3] *cf. Spinelli v. United States*, 393 U.S. 410, 415 (1969) ("... probable cause must be determined by a neutral and detached magistrate, and not by the officer engaged in the often competitive enterprise of ferreting out crime.") (quotation marks and supporting citation omitted). Shortly after *Johnson*, Justice Douglas authored the Court's opinion in *McDonald v. United States*, 335 U.S. 451 (1948), where the Court reversed gambling convictions because police, without a warrant, entered rooms in a home where the gambling enterprise was operating. While finding for the petitioner, Justice Douglas explained:

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3. *Johnson v. United States, ante*, was cited, with approval within Justice Stewart's reversing opinion in *Mincey v. Arizona*, 437 U.S. 385 at 395 (1978).

> *Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*

445 U.S. at 455-56 (ital. emph. added).

The guidance provided in *Johnson* and *McDonald* served as the backdrop for subsequent Fourth Amendment decisions, including *Payton v. New York*, 445 U.S. 573 (1980), where the Court explained:

> The Fourth Amendment has drawn a firm line at the entrance to the house, a threshold which police officers may not cross without a warrant.

445 U.S. at 589 (quotation marks omitted).

In Welsh v. Wisconsin, 466 U.S. 740, 748 (1984), the Court explained: "it is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (supporting citation omitted). *Welsh* also explained that the government has [a] "heavy burden" justifying the warrantless entry. 466 U.S. at 749-50 ("Prior decisions of this Court, however, have emphasized that exceptions

to the warrant requirement are few in number and carefully delineated, * * * and that the police bear a *heavy burden* when attempting to demonstrate an urgent need that might justify warrantless searches or arrests") (ital. emph. added, internal quotation marks and supporting citations omitted). Recently, in *Kirk v. Louisiana*, 536 U.S. 635 (2002) (*per curiam*), the Court reversed drug convictions where police, absent any warrant, entered an apartment, seized drugs and arrested *Kirk*. On review, the Court, explained:

> We held that because the Fourth Amendment has drawn a firm line at the *entrance of the house*... [a]bsent exigent circumstances, that *threshold* may not reasonably be crossed without a warrant. * * * . *As Payton makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.*

536 U.S. at 638 (emph. added).

In the ensemble, *Payton*, *Welsh* and *Kirk* recount settled Fourth Amendment principles which include (1) warrantless home searches are presumptively unreasonable, and (2) to enter a home the police must have a warrant, or probable cause *plus* exigent circumstances; and (3) the government has [a] "heavy burden" of justifying the warrantless entry.[4]

4. The lower courts are divided regarding the pre-*Brigham City* exigent circumstances standard of review. Compare *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (exigent circumstances reviewed for clear error); *United States v.* (Cont'd)

Here the warrantless entry into petitioner's home was presumptively unreasonable, probable cause *plus* exigent circumstances were non-existent, and the government failed to meet this "heavy burden" while seeking to justify the armed intrusion into petitioner's curtilage/home. And, to be sure, "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light. . . ." *Byars v. United States*, 273 U.S. 28, 29-30 (1927).

The agents had been monitoring petitioner's home for two or more hours–and certainly–they had ample time to seek [a] telephone search warrant. *See* Fed. R. Crim. P. 41(d)(3)(A) (authorizing telephone search warrants–which according to Circuit Judge Posner in *United States v. Collins*, 510 F.3d 697, 698 (7th Cir. 2007), can be obtained within minutes either by telephone or e-mail). The record is silent regarding whether the DEA agents requested a telephone search warrant–they may have abstained seeking judicial authorization because probable cause for a search warrant was untenable, *see Whiteley v. Warden*, 401 U.S. 560, 566 (1971) ("standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenge arrest and search are *at least as stringent as the standard applied with respect to the magistrate's assessment*") (ital. emph. added and parallel citation omitted).

(Cont'd)

Blount, 123 F.3d 831, 837 (5th Cir. 1997) (same) with *United States v. Goree*, 365 F.3d 1086, 1090 (DC Cir. 2004) (exigent circumstances determinations review *de novo*); *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995) (same); *United States v. Gaitan-Acevedo*, 148 F.3d 577, 585 (6th Cir. 1998) (same); *United States v. VonWillie*, 59 F.3d 922, 925 (9th Cir. 1995) (same).

The totality of information/contemporaneous events failed to reveal any hint of danger or weapons. Tr. 158. The nebulous information provided by Bjerga included innocent details such as a description of petitioner's home, phone number and the car he usually drove.[5] The informant also related that on an uncertain date a black Lexus (or a rented car) would ferry a large sum of U.S.C. from Chicago to New York. Tr. 4-6, 39. The sole intervening occurrence related to the arrest of Vitagliano with 200 Ecstacy pills, [a] "knock and talk" resulting in momentarily seeing a man–covered with a towel– who responded "hold on" or some such thing. Finally, Agent Oko heard an otherwise undefined "swishing" sound emanating from petitioner's backyard. Tr. 179-80. Petitioner asserts that the composite information and events failed to rise to the level of *probable cause plus exigent circumstances* justifying the warrantless entry into petitioner's protected

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5. The lower courts hold that corroboration of readily available information (innocent details) fails to establish the reliability of informant-information, *see United States v. Rasor*, 599 F.2d 1330, 1332 (5th Cir. 1999) (holding that corroboration of information that was readily available to many persons does not demonstrate reliability) (quotation marks omitted); *United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993) ("mere confirmation of innocent static details is insufficient to support an anonymous tip"); *United States v. Gibson*, 928 F.2d 250, 252-53 (8th Cir. 1991) (insufficient showing of probable cause when officer only corroborated innocent details of utility records for account name, revenue agency for physical description, and car titles, and there was neither surveillance nor observation of unusual civilian or vehicular traffic at the address * * * .) (quotation marks omitted); *United States v. Weaver*, 99 F.3d 1372, 1379 (6th Cir. 1996) (same), *Sira v. Morton*, 380 F.3d 57, 79-80 (2nd Cir. 2004) (same-collecting cases).

curtilage/home. And, in all events, Agent Oko testified that after the first flushing sound–he made the "determination" that "they" were going into petitioner's home. *Id.* at 156.

Petitioner contends that while *Brigham City* provides a reasonable approach to circumstances where police have objectively reasonable grounds for the warrantless entry into a home–where an occupant's safety or welfare demands swift action, the same police objectivity is absent where zealous federal agents execute a warrantless entry, without both probable cause plus exigent circumstances. This petition provides a pristine vehicle to resolve vexing Fourth Amendment questions arising from warrantless home entries where there is no hint of the need to come to the aid of anyone because of health or safety concerns.

B. BEFORE AND AFTER *BRIGHAM CITY* THE LOWER COURTS REMAIN DIVIDED REGARDING WARRANTLESS HOME ENTRIES BASED ON EXIGENT CIRCUMSTANCES AND WHETHER THE POLICE CAN "CREATE" CIRCUMSTANCES JUSTIFYING WARRANTLESS ENTRIES.

In *United States v. Snipe*, 515 F.3d 957 (9th Cir. 2008), the court affirmed suppression rejection where police, acting without a warrant, entered *Snipe's* home following an early morning call urging the police to come to the home "now." 515 F.3d at 949. On arrival, they knocked on the door, it opened and upon entering they saw several individuals sitting around a kitchen table. One asked why the police were there, and responding to police questions stated that no one was "hurt." While

in the apartment the officers saw drugs in open view, but finding no emergency they left and promptly obtained a search warrant. *Id.* at 949-50. Following execution of the search warrant the police recovered drugs and a weapon. *Id.* at 950. After *Snipe's* suppression motion was denied, he appealed contending that the warrantless entry violated the Fourth Amendment.

The Ninth Circuit affirmed the district court explaining, *inter alia,* that after *Brigham City,* the pertinent questions–considering the entire record–[are] whether the circumstances, viewed objectively, justified the action . . . and whether "the manner of the officers' entry was also reasonable." *Id.* at 951 (quoting *Brigham City*). The *Snipe* court explained that the subjective motivations of the police are "irrelevant to determining whether such entries are justified," and "*Brigham City* failed to conduct any traditional probable cause inquiry." *Id.* at 951-52 (quotation marks added). *Snipe* continued: "Instead, the Court assumed that probable cause to associate the emergency with the place to be searched exists whenever law enforcement officers have an objectively reasonable basis for concluding that an emergency is unfolding in that place." 515 F.3d at 952 (quotation marks ours).

The *Snipe* court, citing *United States v. Holloway,* 290 F.3d 1331, 1338 (11th Cir. 2002) and *Koch v. Brattleboro,* 287 F.3d 162, 169 (2nd Cir. 2002), explained that "in an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger." *Id.* at 952 (quotation marks in original). Importantly, in *Snipe,* there was an early morning call

to the police for "help" which served as the predicate for the police presence at the home. Hence, by extension, the *Brigham City* "exigent circumstances" doctrine applied because of the antecedent telephone call requesting "help" [now]. 515 F.3d at 949.

In stark contrast to *Snipe* and *Brigham City*, the recent decisions in *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008), and *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008), are instructive regarding drug and weapon investigations where the government relies on exigent circumstances in support of warrantless arrests and seizures. In *Mowatt*, police officers were dispatched to an apartment in a high-crime area because of loud music and marijuana odors. When they arrived at *Mowatt's* apartment they knocked several times–he refused to open the door. When he finally opened the door *Mowatt* held his right hand behind his back. The officers, being concerned for their safety, pushed their way in and, after a struggle, eventually subdued *Mowatt*. During the struggle a refrigerator door opened and the police saw drugs in plain view. They later obtained a search warrant and recovered weapons and drugs. 513 F.3d at 397-98. *Mowatt* was charged with federal drug and weapon offenses and, post-indictment, his motion to suppress was denied. The Fourth Circuit reversed, finding, *inter alia*, that the exigent circumstances which led to the initial warrantless entry and subsequent search warrant were the result of exigent circumstances "created" by the police. While finding that *Johnson v. United States*, 333 U.S. 10 (1948), informed its analysis, the *Mowatt* court explained that the officers had the option of leaving the probable cause determination to a magistrate and needed only "to seek a warrant before

confronting the apartment's occupants. By not doing so, they set up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crime." 513 F.3d at 402 (quotation marks added, n 8 omitted). Regarding "creating" exigent circumstances, the court cited, with approval, decisions from the Third, Fourth, Fifth, Eighth and Eleventh Circuits–each holding, in part, that law enforcement authorities may not "create" exigent circumstances in order to bypass the Fourth Amendment's warrant requirements.[6]

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6. The *Mowatt* court, 513 F.3d at 403, cited the following decisions in connection with "creating" exigent circumstances. *See United States v. McCraw*, 920 F.2d 224, 230 (4th Cir. 1990) (holding that no exigency justified officers' warrantless entry * * * "[a]ny risk of the destruction of evidence . . . was precipitated by the agents[ ] themselves when they knocked on the door"); *United States v. Collazo*, 732 F.2d 1200, 1204 (4th Cir. 1984) ("The government will not be allowed to plead its own lack of preparation to create an exigency justifying warrantless entry."); *United States v. Coles*, 437 F.3d 361, 370 (3d Cir. 2006) ("[I]n order to determine whether the police impermissibly manufacture or create exigent circumstances, we must look to the reasonableness and propriety of their actions and investigative tactics preceding their warrantless entry." (emphasis in original omitted)); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir .2004) (*en banc*) (similar); *United States v. McGregor*, 31 F.3d 1067, 1069 (11th Cir. 1994) (similar); *United States v. Duchi*, 906 F.2d 1278, 1284-85 (8th Cir. 1990) (similar); *United States v. Paul*, 808 F.2d 645, 647 (7th Cir. 1986) (similar).

Further, in *United States v. Troop*, 514 F.3d 405, 410-11 (5th Cir. 2008) (the reversing court similarly held that the government may not "create" exigent circumstances in order to avoid warrant requirements).

In *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008), the court reversed firearm convictions while considering exigent circumstances *vel non* . The *Reeves* facts revealed that police officers from Carbon County, Wyoming, responded to an assault investigation at around 9:30 p.m. on March 13, 2005. A liquor store clerk told the officers she heard comments earlier that day from *Reeves*: "sometimes you gotta do what you gotta do and God tells you what to do." 524 F.3d at 1164. Several hours later, police officers went to a local motel where *Reeves* had lived for about three months. *Reeves* was called by motel personnel but did not answer, and the police went to his room. After twenty minutes of banging on his door, *Reeves* opened the door, exited the room wearing a gun holster in open view. He was arrested and a "protective sweep" of the room revealed weapons in plain view. *Id.* at 1164. *Reeves* later executed a search consent form and the weapons were seized. The district court denied his motion to suppress and on appeal the Tenth Circuit reversed. Initially, citing *Payton v. New York* and *Kirk v. Louisiana*, *ante*, the court explained that the police may not enter a home without consent to make a warrantless routine felony arrest even with probable cause, and the Fourth Amendment has drawn a firm line at the entrance to the house. *Id.* at 1165. Regarding knock and talk/exigent circumstances, the court noted that an encounter in the house could not be considered investigatory because it would render "*Payton's* requirements" meaningless because *Payton* applies to all seizures. *Id.* at 1166. The Tenth Circuit reasoned:

> That *Payton* applies to all warrantless seizures in the home is the only logical outcome. If we were to hold otherwise, it would allow a seizure in the home when only reasonable suspicion

> exists, yet prohibit a seizure in the home when an officer has probable cause to arrest, but no exigent circumstances. It cannot be the case that *Payton*'s firm line at the entrance to the house offers less protection to individuals for whom probable cause to arrest does not exist. 445 U.S. at 576.

524 F.3d at 1167 (itals. in original, quotation marks omitted). The Tenth Circuit also cited *United States v. Mowatt*, *ante* ("A factor that develops post-seizure cannot be used to justify exigency."). 524 F.3d at 1170.

Petitioner urges that the Court embrace the reasoning of the Fourth and Tenth Circuits in *Mowatt* and *Reeves*.[7] Neither cited *Brigham City* within the

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7. Additional pre-*Brigham City* decisions addressing "creating" and explaining exigent circumstances include *United States v. Vega*, 221 F.3d 789, 798-99 (5th Cir. 2000) (following knock and talk/announce defendant ran out of the backdoor of his home where he was arrested; court found for the defendant holding that "exigent circumstances" are determined before defendant was aware of the officers presence at the home); *United States v. Chambers*, 395 F.3d 563, 565-66 (6th Cir. 2005) (affirming suppression finding that warrantless home entry not justified by exigent circumstances–knock and talk analysis, citing *McDonald v. United States*, *ante*); *United States v. Coles*, 437 F.3d 361, 366-67 (3rd Cir. 2006) (police created exigent circumstances; divided court reversed suppression denial, citing, *inter alia*, *Johnson v. United States*) ("We read *Johnson* as focusing the Fourth Amendment inquiries upon the reasonableness and propriety of the actions taken by the police *preceding* the warrantless search. That inquiry is also essential in the police created-exigency context."); *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984) (police are not free to create exigencies to justify warrantless intrusions).

fabric of their respective Fourth Amendment analyses. Thus, petitioner advances that *Brigham City* is necessarily limited to emergency (exigent) circumstances where police are responding to situations where those in a home are in need of immediate police help.

In stark contrast to *Brigham City* and *Snipe*, petitioner's case does not involve any call to the DEA for to provide assistance or aid to an occupant in petitioner's home. Rather, petitioner's case is analogous to *Johnson* and *McDonald*, and the Fourth and Tenth Circuit decisions in *Mowatt* and *Reeves* where the police "created" the exigent circumstances by performing a "knock and talk." Here the "knock and talk" resulted in DEA agents seeing a towel-clad man retreat to the rear of his home. Stated otherwise, rather than taking a few moments to seek a telephone warrant pursuant to Fed. R. Crim. P. 41(d)(3)(A), *et seq.*, the federal agents decided that their warrantless "encroachment" would be sustained by the lower courts irrespective of the Fourth Amendment. But as Justice Jackson explained in *Johnson v. United States*–decades before the availability of telephone or e-mail search warrants:

> No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate.

333 U.S. at 14.[8]

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8. *See also* 4 LaFave, Search and Seizure, § 6.5(b), pp. 399-400 and n. 50 (2004) (collecting cases).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MARCH 21, 2008

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 07-1132 & 07-1152

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO FIASCHE and ANTONIO VITAGLIANO,

Defendants-Appellants.

Argued February 15, 2008—Decided March 21, 2008

Before FLAUM, WOOD, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Two Antonios—Vitagliano and Fiasche—entered conditional guilty pleas to charges that they conspired to possess, with intent to distribute, various controlled substances, namely, methylenedioxymethamphetamine (MDMA or ecstasy), methylenedioxyamphetamine (MDA), and marijuana. They now appeal their convictions, arguing that their motions to suppress evidence were wrongly denied. We start with the facts.

Sometime during the last week of August 2005, a fellow named Lars Bjerga was arrested, somewhere in Kentucky, with a lot of marijuana. Like many people caught in his sort of jam, he decided to roll over and spill the beans on others involved in the illicit drug business. On September 2, 2005, a DEA agent in Louisville called a DEA agent in Chicago (Jennifer Traud) and reported to her what was learned from Bjerga.

According to the information received, Bjerga had, a week or so before his arrest, delivered $134,000 in drug money to "Tony" who lived in a white brick house with an attached garage, a fenced-in backyard, and a gazebo. The residence was in the vicinity of Lawrence and Maria Streets in Chicago. According to Bjerga, "Tony" and another man were trafficking drugs out of the residence and were going to be taking some $500,000 in drug money from Chicago to New York either on September 2 (the very day Agent Traud received the call) or the following day. The trip to New York would be either in "Tony's" black Lexus or a rental car.

Bjerga also provided two phone numbers, one for Tony's "house phone" and a second for his "dope phone." Agent Traud soon learned that the "dope phone" was a prepaid cellular phone[1] with no subscriber information. The "house phone" was registered to Antonio Fiasche, at 4738 North Maria Court in Chicago, Illinois. The

1. Those who watch the acclaimed HBO hit series, *The Wire*, know that these phones (usually called "burners") are difficult to trace and a favored tool of drug dealers.

address matched, to a tee, the description of a house "in the vicinity" of Lawrence and Maria Streets.

With this information in hand, the DEA sprang into action, setting up surveillance of "Tony's" house on North Maria. Shortly after arriving there, around 12:30 p.m., the agents saw a black Lexus, with who would later be identified as Antonio Fiasche at the wheel, drive off. The Lexus made two mundane stops and returned home an hour later, around 1:30 p.m.

When Fiasche returned, another car was parked in the driveway—a silver Chevrolet Malibu—which had arrived approximately 15 minutes earlier. A man (later identified as Vitagliano) exited the car when it arrived, opened the garage door using an electronic security keypad, and entered the house. At around 1:45 p.m., Vitagliano left the house carrying a white box and a brown bag. His hold on the box and bag was rather odd, as he carried them "in his hands like he was carrying a cake." Vitagliano placed the box and the bag on the passenger side of the Malibu and drove away, heading east on Lawrence Avenue. Several agents, in separate cars, followed.

After following Vitagliano for some time, one of the surveillance officers pulled next to Vitagliano's Malibu. The agent noticed that Vitagliano appeared to be talking on a silver Motorola "Razr" cellular phone.[2] This led the

2. Although there is no other record of a phone call from Vitagliano's Motorola Razr phone, Vitagliano testified that he had made a call on another cell phone during his drive. Phone records show that the call was made at 1:50 p.m.

agents to be concerned that Vitagliano may have discovered that he was being followed and alerted Fiasche to the fact that the house might be under surveillance. Following this encounter, according to testimony found to be credible by the district judge, Vitagliano began "[w]eaving in and out of traffic at a high rate of speed," in an apparent attempt to evade surveillance. Based on these observations—coupled with the fact that Vitagliano had left what they thought was a drug house at 4738 North Maria only moments ago carrying two packages—the agents decided to make an investigatory stop.

At 2 p.m., some 15 minutes after Vitagliano left the Maria Street residence, the agents activated their lights and sirens and stopped the Malibu. The agents then confronted Vitagliano, told him he was observed leaving the Maria Street residence, and that they were conducting a drug investigation. The agents patted Vitagliano down for weapons and asked for permission to search the Malibu. He consented. The search turned up 107 MDA tablets and 157 MDMA tablets in the bag Vitagliano carried from the Maria Street residence. The box he carried contained a Hewlett Packard palm pilot.

While all this was going on, surveillance on the Maria Street residence continued. Soon after the drugs were found in Vitagliano's car, agents staked out at the Maria Street residence were told about the hit. They were also told that Vitagliano had made a cell phone call while under the agents' watch and that someone in the house (Fiasche) may have been tipped off. Based on this

information, the agents decided to approach the house to try to do a "consent search."

Around 2:20 p.m., Agent Traud and others, Supervisor Walters, Officer Arthur, and Special Agent Emilia Fernandez among them, approached the front door of 4738 North Maria. Officer Arthur testified that he was wearing a bullet-proof vest with "police" symbols on the front and back. The agents knocked on the door several times. After several knocks, Officer Arthur—who was positioned to the side of the door with a bay window behind him—saw the blinds move and heard someone yell "hold on," or words to that effect. When Officer Arthur looked in the bay window, he saw a man running down the hallway, covered only with a white towel.

At this time, Agent Timothy Oko was standing on the side of the house to ensure no one fled from the side door. Right around the time the agents at the door first knocked, Agent Oko heard a loud "swishing sound" from the back of the house. Agent Oko, a moment later, "heard a flushing sound coming from a [bathroom] window . . . next to th[e] patio door." At that point, Agent Fernandez entered the backyard and Oko advised her that "somebody's flushing the toilet" and requested that she alert the agents at the front door. Between 30 seconds and a minute later, Oko heard a second flush. At that point, Agent Oko "believed that somebody was destroying evidence in the residence." Moments later, Agents Traud and Walters joined Oko in the backyard and the three agents entered the house through the

patio door with their weapons drawn. Once inside, Agent Walters let Officer Arthur and Agent Fernandez in through the front door.

The agents initially cleared the kitchen area and then proceeded to secure the rest of the main floor. When securing the house, the agents noticed a "strong odor of marijuana." In the bathroom next to the master bedroom area (where Agent Oko had earlier heard the flushing sounds), agents saw "pills scattered all over the floor . . . a large duffle bag with pills . . . [a] heat sealed bag that was open and empty laying on the ground, along with . . . additional multiple bags containing small pills inside that duffle bag." Pills were also in the toilet. The agents secured Fiasche who, after being told what they were investigating, signed a consent to search form. The search that followed turned up over 25,000 MDMA (ecstasy) pills, MDA, and marijuana.

The evidence seized from Vitagliano's car and Fiasche's house was ruled admissible by the district court (Judge David Coar) after a hearing on their motions to suppress. The denial of the motions, which preceded the defendants' guilty pleas, is the only matter of concern on this appeal.

The defendants' brief, in its "Summary of Argument" section, is "creative." Here, word for word, is what it says about the search of Fiasche's house:

> The government's suppression testimonial cache consisted of nothing more than rank

> speculation and quantum leaps-of-faith as putative justification for its intrusion into constitutionally protected privacy zones (curtilage/home). An experienced, well-trained and hopelessly creative federal agent raided Fiasche's home based on a charade—his purported hearing of an unexplainable "swishing" sound. And, to boot, seeing nothing . . . the same agent perpetuated the constitutionally infirm intrusion by walking up four or five patio stairs (within Fourth Amendment protected area) which permitted his hearing of "flushing" sounds.
>
> If the court please, that dearth of evidence, [even] taking into account the seizure of a small quantity of Ecstasy (several miles from the home), failed to provide Probable Cause *and* Exigent Circumstances supporting the breach into Fiasche's backyard and home. Accordingly, the district court erred in rejecting Fiasche's suppression importunings.

The defendants' summary regarding the stop of Vitagliano's car is less colorful so we will not repeat it here. But we will start with that search after briefly noting the standard of review which governs the case.

We review a district court's legal conclusions on a motion to suppress, including the question whether reasonable suspicion existed to justify a stop, *de novo*,

while findings of fact are reviewed only for clear error. *United States v. Riley*, 493 F.3d 803 (7th Cir.2007). Mixed questions of law and fact, including whether exigent circumstances exist, are reviewed *de novo*. *United States v. Richardson*, 208 F.3d 626 (7th Cir.2000). Because the resolution of a motion to suppress is almost always fact-specific, we give special deference to the district judge who heard the testimony and observed the witnesses at the suppression hearing. And with respect to witness testimony, "determinations of witness credibility can virtually never be clear error." *United States v. Biggs*, 491 F.3d 616, 621 (7th Cir.2007) (internal quotations marks and citations omitted). Lastly, arguments advanced for the first time on appeal are reviewed only for plain error.

Vitagliano argues, weakly we think given the facts of this case, that the agents lacked "reasonable suspicion" when they directed his car to a stop. "Reasonable suspicion," of course, lies in an area between probable cause and a mere hunch. Its existence is discovered by common sense, as the Supreme Court explains:

> Reasonable suspicion is a less demanding standard then probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from

> information that is less reliable than that required to show probable cause.

Alabama v. White, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). "When determining whether an officer had reasonable suspicion, courts examine the totality of the circumstances known to the officer at the time of the stop, including the experience of the officer and the behavior and characteristics of the suspect." *United States v. Lawshea*, 461 F.3d 857, 859 (7th Cir.2006). Reasonable suspicion does not deal with hard certainties, and "behavior which is susceptible to an innocent explanation when isolated from its context may still give rise to reasonable suspicion when considered in light of all of the factors at play." *United States v. Baskin*, 401 F.3d 788, 793 (7th Cir.2005).

Armed with the information provided by Bjerga, which so far checked out to be accurate, and their own observations of the odd way Vitagliano carried the box and bag from the house, the agents, employing even a modicum of common sense, had reasonable suspicion to conclude that something was rotten in Denmark when Vitagliano's car sped up a bit just prior to the stop. A *Terry* stop (*Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) was clearly justified. And because Judge Coar credited the agents' account of how Vitagliano was driving over the contrary testimony offered by Vitagliano, we conclude that the motion to suppress was properly denied.

Vitagliano's other claims, that the pat-down search was improper and that his consent to search the car was involuntary (issues he didn't quite raise in that form in the district court and are, therefore, limited to plain error review), are without merit. For one thing, the pat-down yielded no weapons or drugs and was a permissive ingredient of this valid *Terry* stop. Vitagliano's argument about his consent to search, resting as it does on the claim that the stop itself was not supported by reasonable suspicion, collapses when the stop is found to be justified.

Turning to the entry into Fiasche's house, we start with the unremarkable observation that warrantless entries into private homes, although per se unreasonable under the Fourth Amendment, are subject to specific exceptions. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). And one, the exigent circumstances exception, provides that a "warrantless entry by criminal law enforcement officials may be legal where there is compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). The government bears the burden of proving that its agents had an objectively reasonable belief that exigent circumstances existed at the time of their warrantless entry into the defendants' residence. *United States v. Foxworth*, 8 F.3d 540 (7th Cir.1993).

Here, we think the agents had more than enough probable cause to believe that drugs—notably Ecstasy tablets based on the Vitagliano stop coupled with the

information from Bjerga—were inside the home. The agents also reasonably concluded (1) that Vitagliano may have alerted Fiasche that his car was being followed, (2) that Fiasche might well want to rid the house of drugs if Vitagliano did not return, (3) that Fiasche, after seeing agents in police vests at the front door, bolted down the hallway after yelling "hold on," and (4) that Agent Oko hearing "flushing sounds" all support Judge Coar's finding that exigent circumstances justified the entry into the home. Given these circumstances, time did not permit seeking out a judge and trying to obtain a search warrant which would, of course, easily have been issued had time not been of the essence. And had the agents waited outside for an hour or so while a search warrant was applied for and obtained, it is certain here that the Chicago sewage system would have been in ecstasy after receiving some 25,000 pills flushed down the toilet from the house at 4738 North Maria Court.

The motions to suppress were correctly denied and the judgments of conviction are Affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MARCH 21, 2008

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: March 21, 2008

BEFORE: JOEL M. FLAUM, Circuit Judge
DIANE P. WOOD, Circuit Judge
TERENCE T. EVANS, Circuit Judge

Nos. 07-1132 & 07-1152

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ANTONIO FIASCHE and ANTONIO VITAGLIANO,

Defendants - Appellants

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 05 CR 765, David H. Coar, Judge

The judgments of the District Court are AFFIRMED, in accordance with the decision of this court entered on this date.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC DATED MAY 9, 2008

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 9, 2008

Before

JOEL M. FLAUM, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

Nos. 07-1132 & 07-1152

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO FIASCHE and ANTONIO VITAGLIANO,

Defendants-Appellants.

ORDER

Antonio Fiasche filed a petition for rehearing on April 2, 2008. Fiasche's codefendant, Antonio Vitagliano,

filed a petition for rehearing on April 11, 2008. Both petitions also sought rehearing en banc. The panel has voted to deny the petitions for rehearing and no judge in active service has requested a vote on the petitions for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 10, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 05-CR-765

HONORABLE DAVID H. COAR

UNITED STATES OF AMERICA

v.

ANTONIO FIASCHE et al.

Defendants.

MEMORANDUM OPINION AND ORDER

Before this Court are two motions to suppress. One is filed by Defendant Antonio Vitagliano; the other by Defendant Antonio Fiasche. On February 1, 2006, this Court held a suppression hearing. This Court has reviewed both the briefing in this case and the testimony at the hearing. Based on the foregoing reasons, the motions to suppress are both DENIED.

Background

On August 25, 2005, the Kentucky State Police arrested Lars Bjerga ("Bjerga") in Kentucky after finding approximately 10 pounds of marijuana in his car.

After the arrest, Bjerga told law enforcement officials about two men in the Chicago area. Bjerga said that one of the men, "Tony", lived in a house near the corner of Maria and Lawrence. Bjerga described the house as a white brick house with an attached garage in front and a gazebo in the fenced-in backyard. Bjerga stated that sometime during the week before his conversation with officials, he had been to the house and given Tony a black briefcase containing approximately $134,000 in narcotics proceeds.

Bjerga told authorities that Tony and another man would be transporting approximately $500,000 in drug proceeds from Chicago to Syracuse in the near future. The men would transport the money in either Tony's late model black Lexus or a rental car, according to Bjerga. He also provided two telephone numbers that he believed were used by Tony: one was described as "Tony's dope phone" and the other was described as "Tony's home phone."

On September 2, 2005 at approximately 11:00 a.m., a DEA task force officer in Kentucky contacted DEA special agent Traud in Chicago and related the information from Bjerga. DEA agents in Chicago immediately researched the two telephone numbers and determined that "Tony's home phone" was a number belonging to Antonio Fiasche, who lived at 4738 North Maria Court. The other number, "Tony's dope phone", was connected to a pre-paid cellular telephone that did not have any subscriber information.

Based on the subscriber information, authorities established surveillance around noon that day at 4738 North Maria Court in Chicago, a white brick house with an attached garage in the front and a gazebo in the backyard. At approximately 12:30 p.m., they observed a late model black Lexus exit the garage. Some law enforcement officers followed the car, while others stayed behind to observe the house.

The driver of the Lexus—later identified as Antonio Fiasche—drove to a chiropractor's office and the Gottlieb hospital. While Fiasche was out, a grey Chevy Malibu arrived at the house. The driver—later identified as Antonio Vitagliano—parked in the driveway, opened the garage by entering a security code into a keypad attached to it, and entered the house.

Fiasche returned to the house at approximately 1:30 p.m., parked in the garage, and entered the house. About fifteen minutes later, Vitagliano exited. He was carrying a white box in a manner that one might carry a cake, according to a testifying agent. A brown paper bag was on top of the box. He placed the items on the passenger's side seat of the Malibu and then drove away from the residence.

Authorities followed the car leaving the house. Included in the group was task force office Sobkowiak. Sobkowiak testified at one point he pulled alongside Vitagliano. Through his open window, he observed that Vitagliano appeared to be using a Motorola Razr cell phone. The two men found themselves looking directly

at each other, Sobkowiak claims. At that point, according to Sobkowiak, Vitagliano began driving at excessive speeds and began weaving in and out of traffic in an attempt to elude surveillance. Sobkowiak related his observations with respect to the cell phone use to others following Vitagliano.

The officers claim that they were concerned that Vitagliano may have "made them" and that he may have alerted others—especially Fiasche—of the surveillance and so decided to make an investigatory stop at the earliest possible opportunity. Officers in two of the three pursuing vehicles activated their lights and sirens. After the authorities blocked his vehicle, Vitagliano pulled over on Irving Park Road.

Sobkowiak's car was stopped ahead of, and parallel to, the Malibu. He exited his vehicle and began to approach the Malibu. At that point, Vitagliano began to drive forward "at idle speed" in what Sobkowiak perceived was an attempt to drive away by slipping through a gap between Sobkowiak's car and another agent's car that was parked directly in front of the Malibu.

The Malibu stopped briefly and then slowly rolled another car length while Sobkowiak yelled for Vitagliano to put the car in park. Sobkowiak also drew his firearm and held it at ready position. He pointed the gun at the Malibu or at the ground. According to the Government, Sobkowiak was the only officer to have a weapon drawn.

As Vitagliano opened the door of the Malibu, the authorities requested that he step out of the car. He complied, and was patted down for weapons. At that point, Sobkowiak's gun was holstered. The authorities then identified themselves and told Vitagliano that they had seen him leave 4738 North Maria Court with packages. The authorities allege that they requested permission to search Vitagliano's car, that he verbally consented, and that he produced his driver's license upon request. They escorted Vitagliano to the back of the Malibu, where he remained while the search was conducted.

During the search of the Malibu, law enforcement officials located a white Hewlett Packard Palm Pilot box on the passenger seat. There was a brown paper bag on top of the box. Two plastic baggies were in the bag. The baggies contained in total over 200 pills: some were orange with the Mercedes Benz logo while others were pink and white. Task police officer Healy asked Vitagliano, "What's in the bag?" Vitagliano replied, "X." The DEA agents understood X to mean ecstasy, a controlled substance. The stop took between one and two minutes. The authorities then took Vitagliano into custody. They put him in Sobkowiak's vehicle and verbally advised him of his Miranda rights. Later, at the Norridge Police Station, Vitagliano was given a written form detailing his Miranda rights. He refused to sign the form. When he was searched at the police station, officers found approximately 14 additional tablets in his pocket.

Vitagliano takes issue with how the Government describes the events.[1] He contends that he did not drive erratically or at high speeds, did not make any calls on his Razr phone between 1:45 p.m. and the time of his arrest, and was more forcibly taken from his car than the Government indicates. He also claims that two officers approached him with guns drawn, rather than one and that he was never asked for nor provided consent to search his vehicle.

This Court finds Sobkowiak's testimony more credible than Vitagliano's regarding the driving style. While phone records of the Razr phone do not show any calls being made between 1:45 p.m. and the time of Vitagliano's arrest, that was not the only phone Vitagliano could have used. Another phone was located in the car; that phone had been used during the time period in question. As for the actual stop, this Court does not find Vitagliano's version of his exit from the car to be credible. Vitagliano claims that he was stopped after a light gray Taurus cut in front of his vehicle and forced him to the right curb lane in a way that he almost struck a parked vehicle. At the same time, a Ford

1. None of the police reports Sobkowiak generated regarding Vitagliano's arrest contained any information indicating that Vitagliano was talking on a cell phone or noticed Sobkowiak driving next to him. The reports also did not mention that Vitagliano drove in an erratic manner and at a high speed. When recalled to the stand, Sobkowiak testified that he observed Vitagliano with the phone up to ear but did not know if he was speaking on it. During his direct examination, he had testified that Vitagliano "was talking on his cell phone, appeared to be talking on his cell phone."

Explorer pulled right next to him and a third vehicle pulled up behind him. Three officers then exited their respective vehicles. Two approached his vehicle, guns drawn, after yelling for him to put his hands up, according to Vitagliano. Only Sobkowiak had a gun drawn, according to the Government, and he put it away when Vitagliano was exiting the vehicle.

According to Vitagliano, a third officer then reached into Vitagliano's car window, grabbed him, and tried to pulled him out of the car. The officer then undid Vitagliano's seatbelt and pulled Vitagliano out of the vehicle. He pushed Vitagliano against the Ford Explorer and then started patting him down. According to the Government, Vitagliano opened his car door, law enforcement officials requested that he step out of the car, and he complied. The Government states that the law enforcement officers identified themselves, explained that they had seen him leave 4738 Maria Court with packages, and requested and received his permission to search the vehicle. This Court also finds that Vitagliano was asked for and did give consent for the search of his car.

After finding the drugs, the agents dealing with Vitagliano relayed the events to their counterparts who had remained at Fiasche's house. Once they learned that Vitagliano had figured out he was being followed, had driven erratically, and had been in the possession of over 200 methamphetamine hydrochloride and methylenedioxyamphetamine tablets, the agents at the house decided to make contact with the occupants by

carrying out what is referred to as a "knock and talk." At about 2:30 p.m., agents Traud, Walters, and task force officer Arthur approached the front door, knocked, waited 15 seconds before knocking again. They were dressed casually, but wore vests. Arthur's said "police" on the front and had a police symbol on the back. Arthur was standing with his left side to the house and a bay window to his rear. From that position, he heard the blinds of the bay window move within the residence and someone yell "hold on." Arthur then looked through the stained glass n the front door and saw a man with a towel running away from the front door.

Meanwhile, DEA agent Oko had positioned himself at the northeast corner of the house. He had a view of the side of the house facing Lawrence and was stationed there in order to ensure that no one ran out the side door. As his counterparts at the front door were in the process of contacting the occupants of the house, Oko heard a "swishing" sound. Oko later testified that the swishing noise sounded like someone was trying to run through a screen door. After hearing the noise, Oko ran through what the government concedes was a presumably closed gate into a backyard which was surrounded by a fence and a brick wall. The backyard was empty. Oko surmised someone had escaped by jumping over the rear wood fence. While retracing his steps, he noticed an open patio class door and a torn or shredded screen sliding door. As he inspected the screen door, he heard a flushing sound from a bathroom inside the house.

Special agent Hernandez entered the backyard soon after. She told Oko that they "had" somebody at the front door. Oko then told her that he heard flushing, and asked her to alert the others and get help. Between thirty seconds and a minute later, Oko heard another flushing sound. Soon after, agents entered the house via the screen patio door.

When Oko, Traud, and Walters entered the house, they had their guns out. They yelled "police" and secured the first floor. Arthur and agent Fernandez were let in via the front door. When they opened the door to the basement, the authorities saw Fiasche coming up the stairs, wearing only a towel. At that point, they holstered their firearms. Fiasche was not patted down, but was asked to place his hands on the wall for a second. Afterwards, he was accompanied to the master bedroom to get some clothes.

Arthur, Oko and Fiasche then returned to the kitchen. Arthur and Fiasche sat at the kitchen table, while Oko remained standing. At that point, Arthur identified himself and the others and explained why they were in the house. In that atmosphere, which Arthur described as a "controlled calm", he asked Fiasche for consent to search the house. Fiasche verbally provided consent, and read and signed a written consent form. All this occurred within five minutes of the agents entering the house. Fiasche was then immediately advised of his Miranda rights. He signed the advice of rights form at 2:30 p.m., between five and seven minutes after the agents had entered the residence.

After it was determined that Fiasche was educated, could read and write, and was not under the influence of drugs, the agents questioned him. The agents later seized approximately 25,000-27,000 controlled substance tablets. Fiasche told them the tablets were his and he was arrested.

Analysis

As a preliminary matter, both Vitagliano and Fiasche take issue with certain omissions in the agents' reports. While it is true that the agents did not note that Vitagliano was driving erratically or on his cell phone in a criminal report, there was sufficient, credible testimony on those matters at the suppression hearing. The same is true for the facts surrounding the noises in the backyard. Moreover, Defendants do not offer credible evidence that contradicts either set of facts. This Court does not find Vitagliano to be credible in his iteration of the facts as they relate to the chase or his consent and does find Oko to be credible about the noise in the backyard. The Defendants also highlight what they perceive to be factual inconsistences with the Government's case. To the extent that these consistencies are actual and relevant, this Court discusses them below.

Vitagliano's Motion to Suppress

Vitagliano raises two arguments in his motion to suppress. The first is that his initial encounter with the police was an arrest without probable cause, rather than

an investigatory stop. The second is that the information received by the DEA did not provide reasonable suspicion of criminal activity such that an investigatory stop was justified.

The Seventh Circuit has noted that "[t]he line between a lawful *Terry* stop and an unlawful arrest is not bright." *United States v. Askew*, 403 F.3d 496, 507 (citations omitted). There has been a "multifaceted expansion of *Terry*," such that "[f]or better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention." *Id.* (citation omitted). In *Askew*, for example, the Court of Appeals determined that the FBI executed a constitutional *Terry* stop "even though the agents blockaded Askew's car and approached with guns drawn." *Id.* at 507. The Court of Appeals added that "the inherent danger in stopping those suspected of drug trafficking, for which guns are known tools of the trade, in a public place where civilian lives might be at risk, warranted the level of intrusion in this case." *Id.*

The same applies in this case. Vitagliano points to the fact that the authorities required him to stop, and that he was ordered to show his hands and forcefully removed from his vehicle at gunpoint before the police seized the drugs in his car. The agents in this case had reason to believe that Vitagliano was part of a duo involved in the drug trade. The arrest took place on main

street during Labor Day weekend. If Vitagliano had attempted to flee, the potential for harm was great. Therefore, the agents acted reasonably in "neutralizing" Vitagliano by surrounding his car and approaching with one or two weapons drawn.[2] *See id.* at 508; *see also Lechuga*, 925 F.2d 1035, 1040 (7th Cir.1991)(collecting authority supporting conclusion that circumstances where weapons are drawn and vehicles are blocked in order to effectuate a stop can be classified as *Terry* stops). Vitagliano does not distinguish these cases, or provide this Court with others that would support a characterization of the initial encounter as an arrest.

The key question with respect to Vitagliano is whether the authorities' actions in stopping Vitagliano's vehicle constituted a proper investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A *Terry* stop is "brief detention which gives officers a chance to verify (or dispel) well-founded suspicions that a person has been, or is about to be engaged in criminal activity." *United States v. Smith*, 3 F.3d 1088, 1095 (7th Cir.1993) (citation omitted). As the Seventh Circuit has noted, "[s]ince the Supreme Court's decision in *Terry*, it has been established that a law enforcement officer may conduct a brief, non-intrusive detention of the person if the office has specific and articulable facts sufficient to give rise to a reasonable suspicion that the person had committed or is

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2. This Court concludes that the question of whether one weapon was drawn or two is immaterial. In *Askew*, for example, more than one agent had a weapon drawn. *Askew*, 403 F.3d at 507.

committing a crime." *United States v. Sheets*, 188 F.3d 829, 837 (7th Cir.1999). Courts consider the "the totality of circumstances known to the officers at the time of the stop" which include "the experience of the law enforcement agent and the behavior and characteristics of the suspect." *U.S. v. Swift*, 220 F.3d 502, 506 (7th Cir.2000) (citation omitted). When evaluating the reasonableness of an investigatory stop, courts first determine whether the officers' actions were justified at the inception of the stop and next determine whether the stop was reasonably related in scope to the circumstances which justified the stop in the first place. *See id.* (citing *Smith*, 3 F.3d 1088).

Vitagliano argues that the agents did not have specific enough information about him such that a *Terry* stop was justified. In support, he notes that he was not specifically identified by Bjerga, was not driving a rental car or older model Lexus, and could not have been carrying $500,000 in cash as he exited the house. The information the DEA had only related to Fiasche, Vitagliano contends, and therefore did not provide predictive information such that the stop was justified.

This Court disagrees. While it is true that Bjerga did not provide much in the way of specific information about Vitagliano, much of what he did say was corroborated. Bjerga said that a second male would be accompanying Tony on the drive. Vitagliano fit that description: he was male and he did arrive at a time when Fiasche and another male were alleged to be planning their drive. The fact that he was driving a

Malibu and not a rental car or an older model Lexus is also not dispositive. *See U.S. v. Askew* (upholding finding of reasonable suspicion when defendant was stopped in car other than the car he was expected to be driving). Bjerga's information was dated, and it was entirely possible that the men could have changed the car they would take or decided to meet at a different location where they would then take a car that Bjerga had identified. As for the cash, under Vitagliano's approach, the agents would not have been justified in stopping anyone who was not possibly transporting $500,000. This Court does not believe that such a showing is required. For example, Vitagliano could have been carrying a portion of the money being transported because he had already obtained or was planning on later obtaining the rest of it, or the men could have changed the amount that they would be transporting.

When the agents observed Vitagliano leaving the house with two packages, they had already found their tipster—a person who was not anonymous and in fact claimed to have a business relationship with the man named Tony who lived at the North Maria Court house—was right about many details. When they went to the address he gave them, they found the house there exactly as described. The phone numbers linked to a number belonging to Antonio Fiasche, an individual likely to be called "Tony", and an unlisted pre-paid number of the sort that one might obtain if one was engaged in the drug trade. A man left the house in an older model black Lexus, the type of car that Bjerga had described as being a possible vehicle used in the

Syracuse trip. When Vitagliano showed up, he proceeded directly into the house. He came back after meeting with Fiasche. He was carrying packages.

The Government, in support of a finding of reasonable suspicion, relies on *United States v. Vega*, 72 F.3d 507, 515 (7th Cir.1995). In *Vega*, agents stopped a man who drove into a garage that was housing 500 kilograms of cocaine, spent ten minutes in the garage and out of view, and then drove out. The Seventh Circuit concluded that there was reasonable suspicion for the stop and noted that the agents both knew that there was cocaine in the garage and observed the defendant driving into the garage and back out in ten minutes. The factual differences between Vega and this case do not necessitate a different outcome. In *Vega*, the agents knew that there was cocaine in the garage because they had arranged the transaction. In this case, the agents were not certain that either drugs or money from drug transactions were in the house. What they did know at that point, however, was sufficient to justify a *Terry* stop. They knew that their source's information had been quite reliable up until that point and they knew that the male who went into Fiasche's house and came out carrying packages could have been carrying either drugs or money from drug dealing.

Vitagliano does not argue—and this Court does not find facts to support the conclusion—that the degree of intrusion was not reasonably related to the circumstances which justified the interference in the first place. *See Vega*, 72 F.3d at 515. As this Court noted

earlier, the circumstances involved stopping Vitagliano, an individual suspected to be involved in the drug trade, in a public place. Moreover, this Court finds the Government's iteration of the facts surrounding the stop and later arrest more credible than Vitagliano's to the extent that such credibility determinations factor into the analysis. Vitagliano's claim that an agent reached into the car window and attempted to pull him out through the window, for example, is not compelling.

Fiasche's Motion to Suppress:

Fiasche contends that there were no exigent circumstances that supported the agents' entry into his home. He is correct that a warrantless search of a home is presumptively unconstitutional. *Payton v. New York*, 455 U.S. 573 (1980). A warrantless entry is permissible, however, when probable cause and exigent circumstances exist. *See United States v. Marshall*, 157 F.3d 477, 482 (7th Cir.1998). Exigent circumstances are found when "there is a compelling need for official action and no time to secure a warrant." *Id.* (citations omitted). The government bears the burden of proving that exigent circumstances existed at the time of entry. *Id.* Courts do not ask what the police could have done, but rather "whether they had, at the time a reasonable belief that there was a compelling need to act and not time to procure a search warrant." *Id.* When law enforcement officials seek to justify their entry based upon a risk of imminent destruction of evidence, as they do in this case, they must show that the facts as they appeared at the moment of entry would lead a reasonable, experienced agent to believe that evidence might be

destroyed before a warrant could be secured. *See id.* (citations omitted).

After reviewing the totality of circumstances in this case, this Court concludes that warrantless entry was permissible. "Probable cause exists if under the totality of circumstances it was reasonable for the officer to believe that a particular individual had committed a crime." *United States v. Evans*, 27 F.3d 1219, 1228 (7th Cir.1994). Whether probable cause exists is a "practical, common sense determination" based on all the circumstances known to the officer at the time. *See United States v. Valencia*, 913 F.2d 378, 382 (7th Cir.1990). Agents had been told by an informant who was a business partner of "Tony" that he was involved in the drug trade. That source was reliable: the house was just as he described, the home phone number did indeed belong to someone whose name could easily be shortened to Tony, and a male at the house had access to a black, older model Lexus. The agents saw two men enter the house. One of the men left after a brief time. When he left, he was carrying two packages. The shortness of his stay made it likely that he entered the house so that he could pick up those packages. When agents stopped him and obtained consent to search the packages, they discovered that the packages contained drugs. At that point, it was reasonable for the agents to believe that both drugs and drug money were passing through the Maria Court address.

The evidence also shows that the agents had an objectively reasonable basis, given the totality of

circumstances, to believe that exigent circumstances existed. After gathering information about Vitagliano's stop and arrest, several agents situated themselves around the house. Some began to carry out a "knock and talk." Oko positioned himself on or near a sidewalk on the side of the house, so he could make sure that no one ran out the side door. While standing there, he heard a "swishing" sound that caused him to run to the rear of the house.[3] He entered the backyard, in order to prevent anyone from escaping.

While the backyard was a protected area, *see United States v. Shanks*, 87 F.3d 977, 979 (7th Cir.1996) (citation omitted), Oko's entry was justified. He knew that the other agents were in the process of contacting the occupants of the house, a house that had been described accurately by the informant and had at one point contained the drugs that were apprehended when Vitagliano was stopped. When he heard the noise, he thought that someone had exited the from the house. He ran back, and saw a broken screen. He then heard a flushing sound. At that point, he learned that contact had been made in front. Then he heard another flush. The sound of flushing, accompanied by the understanding that the occupants were aware of police presence, created exigent circumstances. Oko could have reasonably believed that Fiasche, alerted to police presence, was flushing evidence in order to destroy it.

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3. At the hearing, Oko testified "the way I perceived it is somebody ran through that screen door and ran out of the house. That's what I was thinking at the time." This Court finds Oko's testimony describing the incident to be credible.

Fiasche argues that any suggestion that he was aware of Vitagliano's arrest is "laughable" because Vitagliano did not tell police that Fiasche expected him to return and did not see him arrested. This Court does not agree that the only way Fiasche could have gotten news of the arrest was if Vitagliano called him. Vitagliano did make or receive a call on a cell phone prior to his arrest: that call could have alerted someone—either Fiasche or one of Fiasche's sources—that Vitagliano was being followed by agents. *See U.S. v. Mikell*, 102 F.3d 470, 476 (11th Cir.1996)(upholding finding of exigent circumstances when authorities who had seen defendant talking on a cellular phone while being pursued and believed that someone remained in apartment in question concluded that defendant could have been instructing that person to destroy the cocaine and other related evidence located in the apartment.). Moreover, an occupant of the house was informed that law enforcement was outside the house when they began the knock and talk while wearing their vests. Even without knowing that Vitagliano had been arrested, the individual who saw the law enforcement agents could have determined that it was the right time to destroy the drugs.[4]

4. The Government also relies on *United States v. Rivera*, 825 F.2d 152 (7th Cir.1987). In *Rivera*, the Seventh Circuit held that exigent circumstances could be supported by a "fear that a fourth or fifth conspirator might be inside the room, ready to destroy the evidence [drugs] if his or her compatriots did not return as planned." *Id.* at 156. In this case, by comparison, the authorities did not believe there to be exigent circumstances at the outset and instead opted to try the knock and talk approach. It was only when Oko heard what he thought might have been someone trying to escape that he entered a protected area. That entry, as noted, was proper because of exigent circumstances.

Fiasche argues that Oko's sweep was not appropriately limited, that the hole was too small for a person to exit through, and that someone could not have jumped the fence in the time it took Oko to get to the backyard. That may be the case, but omniscience is not required. Having heard the sound, and having surmised that someone had run through the screen door, Oko was justified in entering through the closed case and surveying the back yard and the broken screen door. It was during his inspection of the screen door that he heard the flushing. The flushing, combined with knowledge that someone in the house was most likely aware of police presence, was sufficient to create exigent circumstances such that warrantless entry was permitted.

Fiasche also contends that there was no valid consent for the search. Once the authorities had legally entered the house under exigent circumstances, "a subsequent search or seizure of items in the room must be justified by a warrant or an exception to the warrant requirement." *United States v. Rivera*, 825 F.2d 152, 157 (7th Cir.1987). In this case, the Government states that Fiasche consented to the search. Whether consent is voluntary is a factual question that "depends on the totality of the circumstances." *United States v. Cellitti*, 387 F.3d 618, 622 (7th Cir.2004). In this case, the authorities did not carry out a search of the house until after obtaining Fiasche's written consent.

Courts review several factors when determining the voluntariness of a defendant's consent, including:

"(1) the person's age, intelligence, and education[;] (2) whether he was advised of his constitutional rights[;] (3) how long he was detained before he gave his consent[;] (4) whether his consent was immediate, or was prompted by repeated requests by the authorities[;] (5) whether any physical coercion was used[;] and (6) whether the individual was in police custody when he gave his consent." *United States v. Santiago*, 428 F.3d 699, 704-705 (7th Cir.2005) (quoting *United States v. Raibley*, 243 F.3d 1069, 1075-1076 (7th Cir.2001)). A review of the totality of the circumstances surrounding Fiasche's signing of the consent form—he signed after authorities had explained the situation to him without using any physical coercion and within five minutes of their entering his residence—lead this Court to find credible the assertion that Fiasche's consent was freely and voluntarily given.

Fiasche counters that the consent was invalid because the entry was illegal. Fiasche's reliance on *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) and *United States v. Jerez*, 108 F.3d 684 (7th Cir.1997) is misplaced: the search in this case did not occur pursuant to illegal conduct. As this Court noted earlier, the authorities were justified in entering the house without a warrant because of exigent circumstances. Fiasche also argues that authorities, in carrying out their protective sweep of the house before obtaining consent, violated the Fourth Amendment. The sweep in this case—which took a minute or two—was limited to clearing and securing the premises. The sweep was limited in nature and intended to protect the

authorities; as such, it was reasonable. *See U.S. v. Blackwell*, 416 F.3d 631, 632 (7th Cir.2005)(noting instances where a protective sweeps have been found reasonable).

Fiasche also argues that his consent is invalid because it preceded a *Miranda* warning. In support, he cites *United States v. Johnson*, 415 F.3d 728 (7th Cir.2005). Fiasche does not explain how *Johnson* helps his case: he offers no analysis or more specific citation. In *Johnson*, the Seventh Circuit on plain error review affirmed the district court's decision to deny a motion to suppress when the police engaged in a series of questions with the defendant without informing him of his rights under Miranda. Interrogation is defined as "any words or actions on the part of the police (other than those normally attendant to arrest and questioning) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 731 (citing *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (footnote omitted)). In this case, no interrogation occurred before Fiasche was advised of his *Miranda* rights: the statements that the government seeks to introduce all took place after Fiasche was advised of his *Miranda* rights. As with the consent to search, this Court concludes that the statements were made voluntarily.

Conclusion

For the foregoing reasons, both motions to suppress are DENIED.

Enter:

s/ David H. Coar
David H. Coar
United States District Judge

Dated: **March 10, 2006**

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DENYING RECONSIDERATION DATED APRIL 5, 2006

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
David H. Coar

CASE NUMBER
05 CR 765-1

DATE
4/5/2006

CASE TITLE
USA vs. Antonio Fiasche

DOCKET ENTRY TEXT
Motion hearing held regarding #52. Defendant's Motion [52] for leave to file oversized motion and memorandum is Granted. For the reasons stated on the record, Defendant's Motion [attached as an exhibit to #54] for Reconsideration is Denied.